

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANDREW GENETT :
for Revision of Determinations or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the Tax :
Law for the Periods March 1, 1994 through February 29, :
1996, June 1, 1998 through August 31, 1998, and :
December 1, 1998 through February 28, 1999. :

ORDER
DTA NOS. 819083
AND 819084

In the Matter of the Petition :
of :
ANDREW GENETT :
for Redetermination of Deficiencies or for Refund of :
New York State and New York City Personal Income Tax :
under Article 22 of the Tax Law and the Administrative :
Code of the City of New York for the Year 1999. :
:

Petitioner, Andrew Genett, 220 Rodney Street, Glen Rock, New Jersey 07459, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 1994 through February 29, 1996, June 1, 1998 through August 31, 1998, and December 1, 1998 through February 28, 1999 and a petition for redetermination of deficiencies or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1999.

The Division of Tax Appeals issued a Determination dated November 24, 2004 in this matter, granting the two petitions and thereby canceling (i) three determinations of additional sales and use tax, plus penalty and interest, by notices of determination L-019809388 through L-019809390 and (ii) four deficiencies asserting penalty due by notices of deficiency L-019809391 through L-019809394.

On January 26, 2005, petitioner filed an application for costs pursuant to Tax Law § 3030 with the Division of Tax Appeals. The Division of Taxation filed a response in opposition on March 9, 2005, which date began the 90-day period for the issuance of this order.¹

Based upon petitioner's application for costs and attached documentation and the Division of Taxation's response, and all pleadings and documents submitted in connection with this matter, Frank W. Barrie, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. The Division of Taxation ("Division") sought to hold petitioner liable for sales tax and withholding taxes, which were not paid over to the State by the limited partnership known as Fashion World Company, LP ("Fashion World"). Fashion World did business as Fashion Café New York and operated a Manhattan restaurant and bar located in Rockefeller Plaza. It was the result of a creative plan of two brothers, Tommaso Buti and Francesco Buti, to develop a theme restaurant, like Planet Hollywood, with the potential for future franchising of their restaurant concept which was built upon the glamor of supermodels and high fashion. The Manhattan

¹ There is no basis in the law or regulations for consideration of petitioner's submission of a reply to the Division's response, which was received on March 30, 2005.

restaurant and bar consisted of 8,000 square feet with a runway down the middle of the premises for the models and fashion shows, with a seating capacity of 220 people.

2. The Division of Taxation (“Division”), by its Tax Compliance Division-Bankruptcy, issued three notices of determination, each dated July 9, 2001, against petitioner, Andrew Genett, as an officer or responsible person of the limited partnership, Fashion World Company, LP² (“Fashion World”), asserting tax, penalty and interest as follows:

Assessment ID	Sales Tax Period	Tax Asserted Due	Interest	Penalty	Payments/ Credits	Total Asserted Due
L-019809389	3/1/94-2/29/96	\$ 226,070.68	\$238,657.20	\$ 83,355.75	\$ 12,387.47	\$ 535,726.16
L-019809390	6/1/98-8/31/98	46,216.43	18,796.55	14,104.95	0.00	79,117.93
L-019809388	12/1/98-2/28/99	39,209.29	1,179.01	6,295.99	39,209.29	7,475.00

Approximately two and one-half years earlier, the Division by its Metropolitan District Office had issued a Statement of Proposed Audit Change for Sales and Use Tax dated December 21, 1998 against Fashion World, for which the Division claims petitioner was a “responsible person.” This statement provided the following breakdown by quarters of the sales tax asserted due of \$226,070.68 as shown above for the two-year period of March 1, 1994 through February 29, 1996 on audited gross sales of \$8,401,913.00:

Period Ended Date	Sales and Use Tax Asserted Due
05/31/94	\$ 119.31
08/31/94	151.82
11/30/94	2,525.84

² On the sales tax return included in the record, the legal name for the sales tax vendor shown on the return is Fashion World Co. LP/ Fashion Cafe.

02/28/95	18,011.97
05/31/95	133,977.41
08/31/95	24,581.94
11/30/95	25,225.30
02/29/96	21,477.09
Total	\$226,070.68

3. The Division by its Tax Compliance Division-Bankruptcy, also issued four notices of deficiency against petitioner, as an officer or responsible person of Fashion World, each dated July 9, 2001, asserting penalty due under Tax Law § 685(g) of \$2,217.91, \$6,271.95, \$3,673.06, and \$2,442.48 for the withholding tax quarters ending March 31, 1999, June 30, 1999, September 30, 1999 and December 31, 1999, respectively.

4. At the hearing, the Division conceded that petitioner was not liable for the largest amount at issue in this proceeding, sales tax due from Fashion World of \$226,070.68 for the two-year period March 1, 1994 through February 29, 1996. The Division based its concession on its assertion that the period of limitations to assess petitioner as a responsible person of Fashion World had expired. In his determination, the administrative law judge noted that the amount of sales tax due from Fashion World for which the Division conceded petitioner was not liable represented 73% of the total sales tax at issue in this proceeding of \$311,496.40. Further, the administrative law judge emphasized that the more important reason why petitioner may not be held so liable was the fact that Mr. Genett did not commence his employment with Fashion World until July 23, 1996, five months *after* the period March 1, 1994 to February 29, 1996 during which Fashion World failed to remit to the State sales tax due of \$226,070.68. Consequently, the administrative law judge noted that it would be completely irrational to assert

that petitioner was under a duty to act for Fashion World for a period that preceded his actual employment as controller of the business.

5. With regard to sales tax due from Fashion World for the period 6/1/98-8/31/98 of \$46,216.43 plus penalty and interest and for the period 12/1/98-2/28/99 of \$39,209.29 plus penalty and interest, the administrative law judge also determined that petitioner was not personally liable. First, he noted that the sales tax for the period 12/1/98-2/28/99 of \$39,209.29 had in fact been *paid*. In addition, he determined that petitioner should not be held liable for penalties and interest imposed for the partnership's failure to file timely returns or for sales tax for the period 6/1/98-8/31/98 of \$46,216.43 after conducting a thorough factual analysis of petitioner's involvement in Fashion World based upon evidence introduced by the parties at the hearing. The Division placed emphasis on petitioner's signing of checks for the partnership and various documents in his capacity of controller and his substantial salary of approximately \$100,000.00 in support of its contention that he was under a duty to act for the partnership. Weighed against these facts was the pivotal fact that petitioner lacked any ownership interest in the partnership and that his involvement in the business had been responsible in that he had *ensured* the payment of taxes for a company whose owners, the Buti brothers, had been guilty of malfeasance and ultimately should be viewed as responsible for its collapse. Petitioner was also determined not to be liable with regard to penalty asserted under Tax Law § 685(g) equal to the total amount of income tax "evaded, or not collected, or not accounted for and paid over" of \$14,605.00 for the year 1999. In addition to concluding that petitioner was not a person required to collect, truthfully account for and pay over withholding taxes during the year 1999 when the business was winding down its affairs and in Chapter 11 bankruptcy, the administrative law judge also emphasized that any such failure to collect and pay over withholding tax on

behalf of Fashion World was not a “willful” failure by petitioner, an additional requirement to hold a person liable under Tax Law § 685(g).

6. Petitioner seeks payment from the Division of \$7,022.00, representing professional services rendered by his representative, Nathan B. Sloan, Esq., consisting of \$6,825.00 for 91 hours of legal work at an hourly rate of \$75.00 and expenses of \$197.00 consisting of (i) \$32.00 of transportation expenses on the day of the hearing, (ii) \$141.00 for the hearing transcript, and (iii) \$24.00 for unspecified expenses incurred in obtaining a New York State Supreme Court order showing the appointing of a receiver for Fashion World. A Statement of Charges attached to a bill on attorney Sloan’s letterhead dated December 16, 2004 itemized the 91 hours of legal work as follows:

Description	Hours
Conference with client	4
Review/analyze NY State tax deficiency notices, ascertain background and determine facts	6
Prepare petition [sic] for conciliation conference	2
Attend conciliation conference	4
Research & prepare brief for conference	3
Review proposed determination [sic]	2
Review final determination [sic]	2
Review statutory [sic] law/applicable cases	10
Draft & submit petition	6
Trial (including transportation)	10
Obtain transcript of trial, review transcript and evidence	20
Draft and submit petitioner’s initial brief	6

Review Division's brief	6
Review final determination of Division of Tax Appeals	2
Prepare application for costs	2
Search NYS Supreme Court archives for court order appointing receiver of Fashion World and details of litigation removing petitioner from position at Fashion World	6
Total hours	91

CONCLUSIONS OF LAW

A. Tax Law § 3030(a) provides, generally, as follows:

In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any tax, *the prevailing party* may be awarded a judgment or settlement for:

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the department, and

(2) reasonable litigation costs incurred in connection with such court proceeding. (Emphasis added.)

B. Petitioner maintained administrative proceedings against the commissioner, first by requesting conciliation conferences³ where his requests were denied, and the statutory notices were *sustained* by the conferee. He then filed petitions to further contest the statutory notices and as noted in the Findings of Fact, he prevailed with the issuance of a determination dated November 24, 2004. The determination of the administrative law judge cancelled three notices of determination and four notices of deficiency, and petitioner was therefore clearly “the prevailing party” pursuant to Tax Law § 3030(c)(5)(A)(i).

³ Sales tax at issue and withholding taxes at issue were the subject of separate requests for conference although such conferences were conducted on the same day by the same conferee and resulted in the issuance of two conciliation orders each dated April 19, 2002 denying petitioner's respective requests.

C. However, any award of costs to petitioner is subject to the limitation of Tax Law § 3030(c)(5)(B)(i) which provides that a taxpayer may not be treated as a prevailing party, and thus may not be awarded costs, if the Division establishes that its position was “substantially justified.” Tax Law § 3030 is modeled after Internal Revenue Code § 7430, and therefore Federal cases may properly be used for guidance (*Matter of Riehm*, Tax Appeals Tribunal, April 4, 1991, *confirmed* 179 AD2d 970, 579 NYS 2d 228, *lv denied* 79 NY2d 759).

D. A position is substantially justified if it has a reasonable basis in both fact and law (*see, Information Resources, Inc. v. United States*, 996 F2d 780, 785; 93-2 US Tax Cas ¶ 50,519), with such determination properly based “on all the facts and circumstances surrounding the case, not solely upon the final outcome” (*Heasley v. Commissioner*, 967 F2d 116, 120, 92 US Tax Cas ¶ 50,412). Furthermore, this determination of “substantially justified” is made in view of what the Division knew at the time the statutory notices were issued (Tax Law § 3030[c][8][B]).

E. With regard to the Notice of Determination dated July 9, 2001 asserting sales tax due of \$226,070.68 plus penalty and interest, the Division’s position was *not* substantially justified. As noted in the Findings of Fact, petitioner was not even employed by Fashion World during the period of March 1, 1994 through February 29, 1996 covered by this notice. Petitioner correctly points out in his motion papers that his employment history was included in the Division’s audit report, and the Division should have known petitioner’s employment history with Fashion World at the time this notice was issued on July 9, 2001. However, with regard to the other statutory notices at issue, it was not until the hearing that petitioner established the facts and circumstances concerning the collapse of the business and his relationship to the Buti brothers. The factors noted in the Findings of Fact which the Division relied upon to assert that petitioner should be held liable as a responsible person for Fashion World’s unpaid sales tax and

withholding tax were sufficient to justify a conclusion that as of July 9, 2001, when the two other notices of determination and four notices of deficiency were issued against petitioner, the Division's position was "substantially justified." The Division correctly points out in its response to the motion that when the notices were issued it had evidence showing "Petitioner signed several documents on behalf of the company including checks for tax remittances, sales and withholding tax returns, a test period audit method election form, monthly operating reports to a bankruptcy court and consents extending the period of limitation for the assessment of tax."

F. It is therefore necessary to review petitioner's proof of his "reasonable administrative costs" to determine whether he has established such costs with regard to his challenge to the one statutory notice issued on July 9, 2001 for which the Division's position was not "substantially justified." As relevant herein, reasonable administrative costs include reasonable fees *paid or incurred* in connection with the administrative proceeding (*see*, Tax Law § 3030[c][2][B]). Petitioner's proof that he *paid or incurred* administrative costs consisted only of an invoice from his representative which does not show payment of the invoice.

G. The Division questions the proof provided by petitioner of his expenses for an attorney to represent him in this proceeding. The Division contends that an application for attorney's fees must contain contemporaneous records of exact tasks conducted and the exact time spent on the case, by whom, their status and usual billing rates (*Naporano Iron and Metal Company v. United States*, 825 F2d 403). Further, petitioner's proof must be closely examined in light of the fact that it consists merely of a statement of *charges*, which does not reflect any actual payments by petitioner. Proof of payment of such charges would have provided some support to a conclusion that they were reasonable charges.

H. Moreover, as noted in Finding of Fact “4,” the Division *conceded* at the start of the hearing on April 25, 2003, that petitioner was not liable for the largest amount at issue in this proceeding, sales tax due from Fashion World of \$226,070.68 for the two-year period March 1, 1994 through February 29, 1996. Consequently, the time expended at the hearing and after the hearing by petitioner’s attorney was in order to defend against the remaining statutory notices, for which the Division’s position was substantially justified. Therefore, any actual costs related to the 52 hours detailed at Finding of Fact “6”, from the 10 hours described as the time taken for the “trial (including transportation)” to the 6 hours described as the time taken to “search NYS Supreme Court archives for court order . . .,” are not recoverable by petitioner as a prevailing party. Further, expenses incurred by petitioner’s attorney of \$197.00 relate to such period as well and are not recoverable.

I. With regard to the remaining 39 hours delineated at Finding of Fact “6”, it is reasonable to conclude that petitioner is entitled to obtain recovery for one-third of such hours, taking into consideration the Division’s complaint that such listing of hours “seems excessive” especially given the lack of a contemporaneous record of time spent as well as the fact that petitioner’s administrative costs to prepare and file a petition and to make ready for hearing also involved developing his defense against statutory notices for which the Division’s position was “substantially justified.” Unlike the situation in *Naporano (supra)*, relied upon by the Division, petitioner here has provided some identification of the specific items of work or tasks performed by his attorney in pressing his case. In addition, in *Naporano*, the court in rejecting the application for attorney fees under the Equal Access to Justice Act, 28 USC § 2412, noted that the *federal statute* required an “itemized statement.” The statutory provisions at issue here do not specify a similar requirement.

J. Pursuant to Tax Law § 3030(c)(1)(B)(iii), an hourly rate for an award of attorney's fees is limited to \$75.00. Applying such rate to 13 hours equals an award of costs of \$975.00.

K. Finally, the Division correctly points out that petitioner has failed to prove that his net worth was less than \$2,000,000.00 as required by Tax Law § 3030(c)(5)(ii)(II). A bare statement by petitioner's representative in his application for costs that "applicant's net worth is not in excess of \$2,000,000.00" is inadequate proof.

L. Consequently, it is hereby ordered that petitioner is granted costs, as a prevailing party, in the amount of \$975.00 pursuant to Tax Law § 3030 conditioned upon his filing of an *affidavit* within 30 days of this order, noting his net worth and listing his primary assets and liabilities, so as to establish that his net worth is not in excess of \$2,000,000.00.

M. Petitioner's application for costs and fees is granted to the extent indicated above.

DATED: Troy, New York
April 14, 2005

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE